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In The

SUPREME COURT OF THE UNITED STATES

LYNN HOWARD

Petitioner,

AGAINST

UNITED STATES ARMY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS (FOURTH CIRCUIT)

Lynn Howard
21510th Postal Company
Box 493
APO AE 09102

A. QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of an individual's due process rights and other constitutional rights when a federal district court dismisses a complaint in a civil case for purported failure to state claims for relief when Plaintiff in fact sets forth a viable cause of action (as to various courts).

2. Is it a denial of an individual's due process rights or other constitutional rights for a federal trial court in an employment discrimination claim where Petitioner sets forth a claim generally consistent with his E.E.O.C. filing (based in part on retaliation discrimination -- in which the retaliatory acts are discussed in the E.E.O.C. decision and set forth in the complaint.

3. It is a denial of an individual's due process and other constitutional rights under the Fifth and Sixth Amendments of the United States Constitution to dismiss a complaint for failure to state a claim, to fail to set forth the missing elements of the claims and causes of action.

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3. It is a denial of an individual's due process and other constitutional rights under the Fifth and Sixth Amendments of the United States Constitution to dismiss a complaint for failure to state a claim, to fail to set forth the missing elements of the claims and causes of action.

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In The
SUPREME COURT OF THE UNITED STATES

LYNN HOWARD
Petitioner,
vs.
UNITED STATES ARMY, et al.,
Respondents.

On Petition For a Writ Of Certiorari To The Ohio Supreme Court (U.S. Supreme Court)

B. PRAYER AND JURISDICTIONAL BASIS FOR RELIEF

Petitioner prays that the Writ of Certiorari be granted herein for the reasons stated below. Jurisdiction of this matter is advanced pursuant to 28 U.S.C. 1257.

STATEMENT OF CONSTITUTIONAL PROVISIONS

Fifth and Sixth Amendments to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, (Lynn Howard, Appellant vs. United States Army, et.al.,) is not reported. The opinion of the U.S. District Court is not reported.

JURISDICTIONAL STATEMENT

Jurisdiction of this matter is advanced pursuant to 28 U.S.C. 1257. The order from which review is sought was entered on November 23, 2004.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 28 U.S.C. 1257, 28 USC 1738, 42 USC 1983, 42 USC 1200(e).

ISSUES ON APPEAL

1. Is it a denial of an individual's due process rights and other constitutional rights when a federal district court dismisses a complaint in a civil case for purported failure to state claims for relief when Plaintiff in fact sets forth a viable cause of action (as to various courts).

2. Is it a denial of an individual's due process rights or other constitutional rights for a federal trial court in an employment discrimination claim where Petitioner sets forth a claim generally consistent with his E.E.O.C. filing (based in part on retaliation discrimination – in which the retaliatory acts are discussed in the E.E.O.C. decision and set forth in the complaint.

3. It is a denial of an individual's due process and other constitutional rights under the Fifth and Sixth Amendments of the United States Constitution to dismiss a complaint for failure to state a

claim, to not indicate the missing elements of the claims and causes of action.

C. STATEMENT OF THE CASE

It should be noted that Petitioner filed his complaint against Defendants (Respondents) with this latter action centered on claims under 42 U.S.C 2000(e), and 28 USC 1257 and 1738 an other provisions of Federal Law, 28 USC 1738, 42 USC 1983, 42 USC 1200(e), for discrimination in employment, equal pay act claim, among other claims (including claims viable in state courts).

Specifically, on November 3, 2003, Petitioner filed a complaint against Respondents in the United States District Court for the Eastern District of Virginia, (within ninety days after receipt of a notice or right to sue from the EEOC). Petitioner also filed a claim for violation of the equal pay act, as well as various state claims. Respondents filed a motion to dismiss Plaintiff's claims on the basis that not all of Petitioner's employment discrimination claims were raised with EEOC when his claim was filed with such agency. Claim was also made, among other aspects, involving such tort claims (defamation, etc.)

Respondents also sought to dismiss on the basis that the claims of Petitioner did set forth viable causes of action, and sought to dismiss certain parties.

By way of background in the initial administrative phrases of this matter, Petitioner filed an internal complaint with the United States Army's internal unit for handling job discrimination concerns, after which mediation proceedings were consummated. Subsequently Petitioner filed an appeal to the EEOC. In proceedings before the EEOC, the Department of the Army participated in such administrative proceedings. The Hearing Officer in this matter rendered the following decision, denying Petitioner's complaint. (Copy attached to Petitioner's complaint)

> Pursuant to 29 C.F.R. Section 1614.405, the Commission accepts the complainant's appeal from the agency's final decision in the above-entitled matter. Complainant alleged that the agency had discriminated against him on the basis of reprisal for prior EEOC activity when he was subjected to disparate treatment in the terms and conditions of his employment with regards to being denied personnel actions, pay, promotions, and training from January 15, 2000 through March 8, 2001.
>
> After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity commission to affirm the agency's final

decision because the preponderance of the evidence of record does not establish that discrimination occurred.

STATEMENT OF RIGHTS ON APPEAL RECONSIDERATION

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OPO) **within thirty (30) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. Section 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. Section 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented

the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. Section 1614.604(c).

Integrated within such decision of the EEOC hearing officer was the right to sue notice. Pursuant to such notice of right to sue, Petitioner then filed his complaint with the U.S. District (In the Eastern Division of Virginia), to wit.

FIRST CAUSE OF ACTION (AGAINST ALL DEFENDANTS)

1. Plaintiff, Lynn Howard, is a citizen of the United States residing at Heidelberg, Germany. Plaintiff is employed overseas as a civilian employee with the United States Army. Defendants are agencies, officials or employees of the United States Government. Defendants John Doe and Jane Doe are individuals involved herein whose true identities are presently unknown.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. section 1391 and other provisions of the United States Code. This action is also brought pursuant to 29 U.S.C. Section 216 and U.S.C. 29 Section 206 and other provisions of Federal Law, including provisions to redress certain rights secured by the Constitution of the United States. This civil action is brought under the authority of 29 USC Section 216 (b) for damages suffered as a result of Defendants violation of the Equal Pay Act [29 USC Section 206(d]. This Court has jurisdiction of the action pursuant to 28 USC Section 1331. Venue herein is proper under 29 USC Section 1391. Defendant, United States Government, and the Department of the Army and other Defendants as set forth herein, is a significant government

organization which, among other primary concerns, conducts business throughout the United States and other areas of the world. Jurisdiction of this Court is also invoked pursuant to 28 U.S.C. Section 1331 and 2343, this being a suit in equity authorized by law. This action is also brought pursuant to 42 U.S.C. Section 1981, 42 U.S.C. Section 2000, etc. and other provisions of Federal Law, to be brought by any citizen of the United States to redress the deprivation of rights, privileges and immunities secured by the Constitution of the United States. This suit is also brought pursuant to other relevant provisions of the United States Code. The amount in controversy exceeds One Hundred Thousand Dollars ($100,000.00), exclusive of costs and interest. Moreover, Plaintiff has filed a complaint (within 180 days after the alleged acts herein) with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission, alleging discrimination based upon race. Neither such Commission made a finding and the EEOC issued a right-to-sue letter in or about August 4, 2003). (A copy of which letter is attached hereby as Exhibit A.) This action is filed within the prescribed ninety day period after receipt of said notice.

3. Plaintiff, Lynn Howard, has been employed by Defendant, United States Government and the Department of the Army for over ten years in the Republic of Germany up to present time. Plaintiff works for the postal arm of the Department of the Army and handles correspondence and mail which are forwarded to various areas of the United States.

4. During the period of his employment with the Department of the Army, Plaintiff has been classified as a "clerical assistant", assigned to the APO mail processing center in Heidelberg, Germany, where he has performed his duties in an exemplary manner. Plaintiff was hired at a rate of $18.00 dollars per hour, and is currently being paid at a rate of $20.95 dollars per hour.

5. For his first cause of action, Plaintiff states that Defendants discriminated against Plaintiff on the basis of his race, sex, and age, denying Plaintiff reasonable working conditions and other employment advantages granted to female

employees, minority employees, employees younger than Plaintiff, and other employees of Defendants and that Plaintiff was harassed by employees of Defendants and known to Defendants including Defendants John Doe and Jane Doe, said harassment and discriminatory acts causing stress, humiliation, and other problems rendering it difficult and perilous to Plaintiff's health to work within such conditions.

6. Said acts of discrimination by Defendants violated the foregoing provisions of the Federal Law, as set forth above, as said acts constituted discrimination against Plaintiff on the basis of his sex, age, and race.

7. As a direct and proximate result of said acts of discrimination by Defendants, Plaintiff has been damaged by loss of esteem, stress, humiliation, loss of employment, lost wages, and additional losses totaling in excess of Seven Hundred Seventy-five Thousand Dollars ($775,000.00) for which amount Plaintiff is entitled to judgment against Defendants, along with other statutory relief.

SECOND CAUSE OF ACTION

8. Plaintiff incorporates by reference the allegations of Plaintiff's first cause of action as if fully rewritten herein.

9. Defendants have engaged or intentionally engaged in unlawful employment practices and policies against Plaintiff in violation of said provision of federal law, including but not limited to 42 U.S.C. section 2000, and other provisions of such law. The discriminatory practices include, but are not limited to the following:

(a) Maintaining, terminating or hiring employees on the basis of sex;

(b) Providing males unfavorable working conditions compared to females, said acts constituting sex discrimination;

(c) Maintaining policies and practices with respect to, but not limited to, wages, job assignment and other terms and conditions of employment which unlawfully operate to deny equal opportunity to employees because of their sex, race, age, and other acts of discrimination;

(d) Permitting harassment of Plaintiff by Defendant's employees;

(e) Denying proper working conditions to Plaintiff;

(f) Wrongfully discriminating against employees, including Plaintiff based on sex, age, and race.

10. As a direct and proximate result of said acts of discrimination by Defendants, plaintiff has been damaged by loss of income, position, prestige, promotions, and additional losses totaling in excess of Eight Hundred Sixty Thousand Dollars ($860,000.00) for which amount Plaintiff is entitled to judgment against Defendants, along with other statutory relief.

THIRD CAUSE OF ACTION

11. Plaintiff incorporates by reference all the allegations of his first two causes of action as if fully rewritten herein.

12. During the course of his employment with Defendants, Plaintiff at times had physical and health problems resulting in a limited disability.

13. This is an action for declaratory relief and damages and to secure protection of and to redress deprivation of Plaintiff's rights decreed by said provisions of Federal Law, providing for certain relief against discrimination in employment.

14. Defendants have engaged in discriminatory practices against Plaintiff regarding the terms and conditions of his employment on the basis of his disability and other aspects, including discrimination against Plaintiff on the basis of his physical disability.

15. As a further result of Defendant's above-stated actions, Plaintiff has been and is now being deprived of income in the form of wages and other benefits, and other fringe benefits due him, in an amount to be proved at trial, said damage exceeding Nine Hundred Sixty Thousand Dollars ($960,000.00).

16. Further, as a proximate result of Defendants' discriminatory and wrongful acts as set forth, Plaintiff has suffered emotional distress, humiliation, embarrassment, and

mental anguish, all to his damages. All said acts have caused damage and loss to Plaintiff in excess of Nine Hundred Sixty Thousand Dollars ($960,000.00), for which amount Plaintiff is entitled to judgment against Defendants.

After such complaint was filed, Respondents filed a motion to dismiss the case on various grounds. Respondents sought dismissal under Federal Civil Rules 12(b)(6) and Civil Rule 41(B) (The latter section covering dismissals for lack of prosecution).

In this Motion to Dismiss, Respondents made certain allegations about procedural grounds, and throughout the discussion in such motion there are various references to factual aspects and developments as to the background of this matter (which are not integrated into the pleadings), some of which are discussed below. (Petitioner filed separate motions that reference was made by Respondents to matters of a factual nature extrinsic to the record.

The three main bases for Respondent's (Defendant's) motion to dismiss were as follows:

(1.) Plaintiff's complaint fails to state valid cause of action
(2.) Plaintiff's complaint sets forth bases of relief not covered by prior filings under the EEOC.
(3.) Plaintiff's complaint names Defendant's that were not subject to the jurisdiction of the U.S. District Court.

Petitioner filed a response to such motion challenging all three bases for such relief. Thereafter, on June 7, 2004 the U.S. District Court granted Respondent's motion.

C. REASONS FOR GRANTING THE WRIT

1. It is a denial of an individual's due process rights and other constitutional rights when a federal district court dismisses a complaint in a civil case for purported failure to state claims for relief when Plaintiff in fact sets forth a viable cause of action (as to various courts).

2. It is a denial of an individual's due process rights or other constitutional rights for a federal trial court in an employment discrimination claim where Petitioner sets forth a claim generally consistent with his E.E.O.C. filing (based in part on retaliation discrimination – in which the retaliatory acts are discussed in the E.E.O.C. decision and set forth in the complaint.

3. It is a denial of an individual's due process and other constitutional rights under the Fifth and Sixth Amendments of the United States Constitution to dismiss a complaint for failure to state a

claim, to not indicate the missing elements of the claims and causes of action.

It is an established general doctrine that an Appellate Court reviews a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction on a *de novo* basis (***Fairfax Co. Redevelopment & Housing Authority v. Schlosser Co.***, 64 F3d 155, 4th Circuit). Petitioner contends a motion to dismiss under Rule 12 (b)(6) should not be granted "unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim, which entitles him relief" (***Conley v Gibson***, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In considering the motion, the Court is generally mandated to accept all factual allegations in the complaint as true. See ***Watson v. Southern R. Co.***, 420 F. Supp 483 (4th Cir. 1975).

In a motion to dismiss a complaint there are two main or basic avenues available to a Defendant to seek dismissal on the substantive matters (on the merits of a complaint). These two routes are either a motion for judgment on pleadings under Federal Civil Rule 12(b) or alternately a motion for summary judgment under Federal Civil Rule 56(A).[1] (Petitioner relates herein pertinent legal constraints on summary judgment motions by reason of Respondents' references to matters outside the record or matters beyond Petitioner's complaint.)

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[1] A motion for judgment under the pleadings under Civil Rule 12-B-6 is apparently the only subpart of Civil Rule 12(B) that restricts the scope of such motion to the pleadings, (e.g. complaint, etc.)

Comparably, a motion for summary judgment under FRCP 56 provides that a party may rely on evidence external to the pleadings and the basic considerations of such a motion must rise from the parameters of the Federal Rules of Civil Procedure, Rule 56(c), which states in part, as follows:

> "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admission, Affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...."

For a motion to dismiss under Federal Civil Rule 12(b)(6), there are areas wherein evidence external to the pleadings can be utilized, such as motions to dismiss because of improper venue or improper jurisdiction. As to subparts 1, 2, 3, 4, 5, and 7 of Civil Rule 12(b)(6) external evidence that could be admissible at trial is permitted, but not so for subpart six (6) of Federal Civil Rule 12(b) (the section concerning judgment on the pleadings for failure to state a cause of action. (See, ***Lefkowitz v Lider***, 1978, 443 F. Supp. 352 D.C. Mass)

EXPLAINATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL ISSUES OR IS A MATTER OF GREAT PUBLIC INTEREST

Petitioner maintains that this case involves substantial constitutional issues, one of which involves the right of the Court to

deprive Petitioner of his right to have legitimate grievances redressed by a court with jurisdiction and a duty to hear such cases.

Petitioner argues that he stated a legitimate cause of action as defined by Federal Rule of Civil Procedure 8(a) by pleading a claim for relief which puts forward a "short plain statement of the grounds upon which the court's jurisdiction depends", and "a short plain statement of the claim showing that the pleader is entitled to relief..." Petitioner argues that his claim for relief was denied court under the auspice that Petitioner failed to state a proper claim. Furthermore, this is a substantial constitutional issue or a matter of great public interest and should be reviewed by this Court to determine what constitutes a claim for relief under Federal Rule of Civil Procedure 8(a).

More specifically, under a Civil Rule 12(b)(6) motion to dismiss a complaint (for failure to state or claims upon which relief can be granted) the initial parameters for review for such a motion (as generally referenced) is Federal Civil Rule 8(A), which rule requires that a claim for relief set forth a short and plain statement of the claim for relief in the pleading showing that the party is entitled to relief. A complaint is to demonstrate some recognized legal basis upon which

judicial relief can be awarded. (See ***District of Columbia v Air Florida, Inc***, 1984, 243 App. DC, 750 F2d 1077).

Further, it has been held at various times (by numerous federal courts) that a complaint which does not set forth all relevant facts should not be dismissed. (See for example ***Hrobec v National Railroad Passenger Corporation,*** 981 Fed. 692, CA, 7th Circuit, Illinois, 1992).

Usually such motions to dismiss are generally not considered consistent with the policy of the federal courts (as well as most state courts) to attempt to adjudicate cases on the merits of the case, and one of the more commonly used procedures is to permit a Respondent to file a motion either a motion for more definite statement or utilize discovery tools authorized under the Federal Civil Rules and/or summary judgment proceedings as discussed above. (See in this regard ***Innovative Digital Equipment v Quantom Technology, Inc.*** 597 F. Supp. 983, No. Ohio 1984-which case supported the use of a motion for definite statement, coupled with granting the moving party leave to refile the motion to dismiss after the receipt of the definite statement.) Yet another guideline for presentment of a motion to dismiss for failure to state a claim upon which relief can be granted, is that only the four

squares of the pleading should be utilized for this purpose. (***Harper v Cserr***, 544 F2d 421.) Generally no aspect outside the record of the case should be presented or used in determining a motion to dismiss on such basis. (***Labounty v Adler***, 933 F2d 121, 1991, CA2, N.Y.) In this respect however, a Court may refer to documents that are attached to the complaint, (such as the EEOC decision appended to Petitioner's complaint.)

In considering Rule 12(b)(6) motion to dismiss, it has been a general thread of the law that the complaint be liberally construed and viewed in the light most favorable to the Petitioner and on a motion to dismiss, a federal court presumes that general allegations embrace those specific facts that are necessary to support the claim. In addition, the well pleaded allegations of fact contained in the complaint and every inference fairly construed therefrom are accepted as true for purposes of such a motion, including facts alleged on information and belief.

In summary, the basic test on a motion to dismiss is whether the complaint, with all the well pleaded material facts taken as true and construed in the light most favorable to the Petitioner, sets forth facts sufficient to state a legal claim. The standard most frequently applied

(in this regard) is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff cannot prove any matters in support of the claims that would entitle the plaintiff to relief. (See ***Scheuer v Rhodes***, 1974, 416 US 232, 40 L Ed 2d 90).

It is further set forth in the last sentence of Federal Civil Rule 12 (B) that if a party files a motion to dismiss for failure to state a claim upon which relief can be granted, and matters outside the pleading are presented in conjunction with such motion, and such extrinsic matters are not excluded by the court, the motion may at the court's discretion be considered as a motion one for summary judgment and disposed of as provided in Federal Civil Rule 56, with the parties given a reasonable opportunity to present all material made pertinent to such a motion. (as indicated in Federal Civil Rule 56 C and 56 E.)

Alternately stated, a motion to dismiss (under Federal Civil Rule 12B) is properly treated as a motion for summary judgment under Federal Civil Rule 56 where, in order to decide the motion, the trial court has to consider evidence or documents submitted in support of the motion as well as the pleadings. Once a trial judge converts a

motion to dismiss to a motion for summary judgment by accepting material beyond the pleading that is objected to in conjunction with the motion, the court may consider any additional material fact that may be admissible or usable at trial.

In short as to the issues in a Federal Civil Rule 12(b)(6) motion (in light of the primary objective of the law to obtain a determination on the merits) there are other effective procedural devices which are useful tools for the determining the particular allegations and the determination of the legal sufficiency of a claim, such as through the discovery procedures, and motions for a more definite statement, judgment on the pleadings, and summary judgment. (See ***Carss v Outboard Marine Corp***. 1958, CCA Fla, 252 F22d 690).

More specifically, as to the summary judgment motions filed by Respondent's the only evidence presented by Respondents are references to past court proceedings that show that the Petitioner was involved in a prior court filing in this court plus the EEOC filing addressed in Petitioner's complaint. While reference to these documents may be hearsay, they could potentially fall within the exceptions of the Federal Civil Rules 802-803, but they were not

authenticated under Evidence Rule 901, nor had they been presented to the court under a judicial notice process (Federal Evidence Rule 201) (or otherwise). (Petitioner clams that such external evidence infected to Respondent's motion violated the extrinsic evidence presented under Rule 12(b)(6).

As can be seen above, in any motion for summary judgment motion, relief cannot be granted to a moving party on the face of the pleading alone to demonstrate a basis for a summary judgment motion (see Civil Rule 56 (C)). Nor are statements of counsel as to factual aspects admissible or otherwise proper to support a motion for summary judgments.

In summary, Respondents did not provide to the court any evidence recognized under Federal Civil Rules 56(C) or 56(E). In fact, Respondents' counsel merely makes statements (without proper supporting affidavits or other proper evidence). It is Respondents' contention that a viable summary judgment motion was not so advanced, nor has been a proper motion under Civil Rule 12(b)(6) been so advanced (since the latter motion of Respondents refers to matters

outside the record. Furthermore, the court failed to even address several issues in the Petitioner's complaint.

In Respondent's motion to dismiss, it is claimed that Petitioner's complaint should be dismissed because it fails to state a claim upon which relief may be granted. A Federal Rule of Civil Procedure (FRCP) 12(b)(6) motion to dismiss is raised here to challenge the sufficiency of Petitioner's complaints. Consequently the appropriate standard to apply in reviewing the issue of sufficiency, is FRCP 8(a) which simply requires that the pleading set forth a claim for relief containing a short and plain statement of the claim demonstrating that the pleader is entitled to relief. (See: ***District of Columbia v. Air Florida, Inc.***, 750 F2d 1077) In other words, a complaint must present sufficient information to suggest that there is some recognized legal theory upon which relief can be granted. ***(Id.)***

Respondents state and claim that Petitioner makes general allegations of discrimination and harassment in his complaint and gives no further information. Defendants cite ***Simpson v Welch***, 900 (F.2d 33, 35 4th Cir. 1990) to the effect that conclusionary statements are not enough and do not state a claim upon which relief can be granted.

However, Petitioner submits, and Respondents recognize as much, that FRCP 8(a) only requires "a short and plain statement of the claim showing that Petitioner is entitled to relief," citing ***Conley v Gibson***, 355 U.S. 41, 47 (1957).

Petitioner did indeed file a complaint setting forth a clear statement of his claim that is sufficient under the guidelines set forth under civil rule 8(a). In this respect Civil Rule 8(a) provides the following guidance:

> A pleading which sets forth a claim for relief whether an original claim; counterclaim; cross-claim; or third party claim, shall contain . . . . (2) a short and plain statement in of the claim showing that the party is entitled to relief.

A perusal of Petitioner's complaint as stated above reveals appropriate and sufficient language to state viable claims.

As can be seen from Petitioner's Complaint set forth above, specific aspects were stated in Petitioner's complaint, which yield sufficient specificity under FRCP 8(a)- which requires (as stated) a short and plain statement – since it is not the intent of the Federal Civil Rules that the complaint set forth

all the facts of a case – as may be used at trial. Moreover, it is noted that each succeeding claim incorporates references from prior causes of action. For example the discrimination claim incorporates the first cause of action of which spells out specifics of wage discrimination etc.

More directly, from the above quoted sections of Petitioner's complaint, Petitioner has set forth a short and plain statement (as required by Federal Civil Rule 8(a) regarding discrimination based on sex, harassment, promotions denied, discrimination in hours, assignments and discrimination relative physical disability (along with common law claims), among other matters, as referenced from prior claims of action. Reading Plaintiff's from prior referenced causes of action in total reveals specific language about these claims.

Contrary to Respondent's allegations, Petitioner does makes particular allegations as to his harassment, pay disparity, and discrimination on disability grounds, as can be seen in the above stated paragraphs from Petitioner's complaint. Relative to such claims by Respondent's, it appears that Respondent's seek to have Petitioner

plead evidence in his complaint. This is not the usual province of a complaint as contemplated by FRCP 8(a). Respondent's always have the availability of a motion to make certain or discovery tools as contemplated by Federal Civil Rules 26, etc. and other procedural methodology to discover evidence.

Furthermore, Federal Courts frequently maintain that a complaint may lack certain relevant facts or recitation of the law and still avoid a FRCP 12(b)(6) dismissal. (See: ***Hrubec v. National R.R. Passenger Corp.***, 981 F2d 962). This general rule is especially true for *pro se litigants* are concerned, which is the case in this situation. A court should not dismiss a plaintiff's

In addition, in regard to this motion of Respondent's, it appears that Respondent's express certain matters outside the record or the pleadings. Note is made that Respondent's assert at page 2 of their motion under statement of material facts the following:

> "This is Mr. Lynn Howard's second attempt to file a judicial complaint out of actions arising from his employment with the U.S. Army in Germany. In Civil Action Number 03-CV-127, after Defendants filed a Motion to Dismiss his Complaint, Howard requested that he be allowed to withdraw the Complaint without prejudice. Prior to making this request, Howard filed the

> instant judicial Complaint. This Court granted his request to withdraw Civil Action Number 03-CV-127."

This latter statement is prejudicial to Petitioner, and interjects matters outside the pleadings. Still another concern with this statement is that the Petitioner voluntarily dismissed the first filing under Civil Rule 41(A) - and there was no finding in that prior case that Petitioner did not properly plead his case – as asserted by Respondent's. This may serve only to prejudice Petitioner and sets forth matter beyond the pleadings in this case.

THE CLAIM OF RESPONDENT THAT PETITIONER DID NOT EXHAUST ADMINISTRATIVE REMEDIES ON ANY OF HIS CLAIMS AND THEY SHOULD BE DISMISSED

Respondent's state in their motion to dismiss that Petitioner did not exhaust the requisite administrative process and therefore such claims should be dismissed. While a plaintiff should exhaust required administrative remedies before filing a lawsuit, such remedies must be a mandatory prerequisite, and as Respondent's suggest, Petitioner should process his claim with the EEOC (42 U.S.C. Section 2000 e-5-B, as Respondent's cite). Respondent's state that the EEOC claim delimits the proper scope of any subsequent lawsuit. Petitioner disagrees to

such a comprehensive contention that all charges are barred, and Respondent's appear to concede that there can be some reasonable relationship to the underlying complaint. In the face of these allegations, Petitioner maintains that administrative remedies were properly processed as more fully discussed below.

Petitioner contends that the scope of the charges in a complaint before the U.S. District Court may exceed the scope of EEOC complaint, and there is some divergence on this issue as between the respective Circuit. See ***Kaplan v. Theatrical Stage Employees***, (525 F2d 1354, 9CCA, 1975 wherein it was held that in EEOC charges that are considered somewhat ambiguous, in close situations, the matters should be resolved towards allowing the unnamed parties to be sued. (See also ***Sanchez v Standard Brands, Inc***. 431 F2d 455, 5th CCA, 1970). (See ***Evans v Sharaton Park Hotel***, 503 F2d 177, D.C.CA, 1974). (See also ***Roepsch v. Bentsen***; 846 F. Supp. 1363, 1994, E.D. Wisc) as to flexibility of issues being reasonably related).

Respondent's contend that the EEOC charge was limited to a reprisal action (after he testified on behalf of a black male employee)[2] in

[2] This factual aspect also transcends the pleadings

another employment discrimination action against the U.S. Army. Over and above the aspect that this refers to matters beyond the pleadings, this conclusion does not comport with a full and proper reading of the EEOC decision. As can be observed from the EEOC decision, (as appended to Petitioner's complaint), there is very little discussed about any factual background (and a sparse amount about the theory of discrimination on which the EEOC decision of August 4, 2003 was based). Reference is had in this regard to paragraph one of the decision which sets forth the following language.

> Pursuant to 29 C.F.R. Section 1614.405, the Commission accepts the complainant's appeal from the agency's final decision in the above-entitled matter. Complainant alleged that the agency had discriminated against him on the basis of reprisal for prior EEO activity when he was subjected to disparate treatment in the terms and conditions of his employment with regards to being denied personnel actions, pay, promotions, and training from January 15, 2000 through March 8, 2001.

As can be seen from the foregoing language, it appears that there were indeed matters or issues of disparate pay, treatment in terms and conditions of employment such as personal actions, promotions, pay, training, (all set forth in Petitioner's complaint). In addition to the reprisal aspect, these delineated matters were apparently also covered

in the EEOC proceeding. It would be vital to reiterate that the EEOC decision (as annexed to Petitioner's complaint is only a final decision – without an elaboration of the complete background or file). Again, it appears that Respondent's are referencing to matters within the entire EEOC file – which again is evidence beyond the face of Petitioner's complaint to support a motion under Civil Rule 12(b)(6).

In addition, it must be noted that Petitioners complaint sets forth claims not cognizable through the EEOC (equal pay claim). Thus any EEOC requirement does not affect the viability of such latter claims.

If indeed Respondent's are reviewing the record of the EEOC proceedings in making these claims, which are not really before this Court – then Petitioner needs to be so informed in order that Petitioner may produce affidavits or other evidence to properly refute Respondent 's allegations. As stated above, whenever a motion to dismiss under Federal Civil Rule 12(b) sets forth matters or utilizes matters outside the record or complaint, then the motion transcends the intended limit of such rule, i.e. to obtain a ruling based only on the contents of the pleadings attachment. Matters beyond such pleadings are generally

beyond the scope of such a motion (to dismiss) for failure to state a claim on which relief can be granted. (See discussion above). Moreover, it is not certain that the defense of failure to exhaust administrative remedies is the proper subject of a Civil Rule 12(b) motion, unless it is a subsumed under Civil Rule 12(b) subsections (1) or (2) as a jurisdictional issue. However Respondent's do not so file their motions under such subsections or raise it as a jurisdictional question. However, if it does exceed the scope of the pleadings under Federal Civil Rule 12(b) motion, the nonmoving party should be allowed to supplement his reply with affidavits, etc. in order to properly frame a response since matters are entered external to the complaint and such supplementary evidence may be necessary in this case.

It should be further stressed that not all the counts of Petitioner's complaint are Title VII actions, as one cause relates to the Equal Pay Act under 29 U.S.C. Sec. 206 and there are two causes of action that are based on common law. These latter claims are clear and state cause of action on specific issues not routed through the EEOC

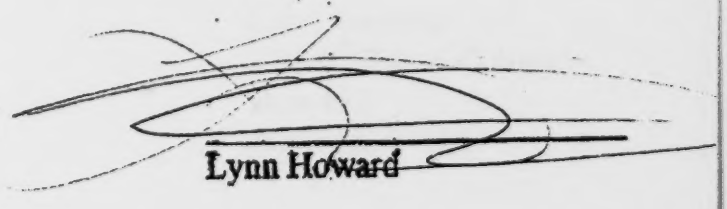
Respondents argue that Petitioner identified a number of individuals as Respondents and organizations as Respondents in this

action, all of which should be dismissed, except the Department of the Army. Respondents state that Petitioner's complaint is a Title VII action, (which is only partly a Title VII action). Respondents argue that the only proper defendant is the Secretary of the Army, in his official capacity, and all other defendants must be dismissed, (citing 42 U.S.C. Section 2000(E)-16(A).) Respondents maintain Petitioner has no right to bring a claim against individual defendants as based on acts occurring in the employment context. Petitioner disagrees since none of the named Respondents were sued in their individual capacity. The court in its order upheld Respondents positions.

Petitioner's maintains that the Motion and Orders which led to dismissal of his case violated the due process efforts of petitioner and there is a significant constitutional concerns involved

CONCLUSION

It is urged that the petition for writ of certiorari should be granted.



Lynn Howard

In The

SUPREME COURT OF THE UNITED STATES

LYNN HOWARD

Petitioner,

against

UNITED STATES ARMY, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

APPENDIX

Lynn Howard
21510th Postal Company
Box 493
APO AE 09102

APPENDIX

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28 USCS § 1257 (2005)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 USCS § 1738 (2005)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 USCS § 1983 (2005)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.
(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer
(A) within 20 days after being served with the summons and complaint, or
(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.
(3) (A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after the United States attorney is served with the pleading asserting the claim.
(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:
(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or
(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the

pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of

this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleadings. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.
(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.
(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.
(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

LYNN HOWARD, Plaintiff – Appellant, versus UNITED STATES ARMY; DONALD RUMSFELD, Secretary of Defense; KATHRYN R. REPPERGER; IRENE MORRISON, MARK KARRAKER, USA POSTAL GROUP EUROPE, US GOVERNMENT; JOHN DOE; JANE DOE, Defendants – Appellees

No. 04-1921

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

114 Fed. Appx. 568, 2004 US. App. LEXIS 24445

November 18, 2004, Submitted
November 23, 2004, Decided

NOTICE: [**1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern district of Virginia, at Alexandria. CA-03-1368-1. Leonie M. Brinkema, District Judge

DISPOSITION: Affirmed

COUNSEL: Lynn Howard, Appellant Pro se.

William Kenneth Witherspoon, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina; Dennis Edward Szybala, Assistant United States Attorney, Alexandria, Virginia; Matthew Paul Ruzicka, UNITED STATES ARMY, Arlington, Virginia, for Appellees

Judges: Before LUTTIG and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Opinion: [*568] PER CURIAM:

Lynn Howard appeals the district court's order dismissing his employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Howard v. United States Army, No. CA-03-1368-1 (E.D. Va. Filed June 7 and entered June 9, 2004). We deny the motion filed by attorney George R. Royer to appear on Howard's behalf as counsel pro have vice as moot. We dispense with oral argument [**2] because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LYNN HOWARD,	)	
Plaintiff,	)	
v.	)	No. 1:03cv1368
UNITES STATES ARMY, et.al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' Motion to dismiss, in which they argue that the Complaint should be dismissed under Rule 12 (b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted, or alternately under Rule 12 (b)91)(for lack of subject matter jurisdiction. The Pro se plaintiff has been given proper Roseboro notice and has filed an Opposition. Defendants have filed a Reply to plaintiff's Opposition For the reasons that follow, defendants' Motion will be GRANTED.

In his Second Amended Complaint (hereinafter "Complaint"), plaintiff, who is a white male civilian employee of the Army at a postal unit in Germany, alleges that the United States Army, Secretary of Defense Donald Rumsfield, various Army and defense department personnel, [1] and the United States Government have violated the Fair Labor Standards Act, The Equal Pay Act, Title VII and Section 1981. Specifically, in Count I of the Complaint, plaintiff alleges that the defendants have discriminated against him on the basis of his race, sex, and age, by denying him reasonable working conditions and other advantages afforded to female employees, minority employees, and employees younger than plaintiff. In Count II, plaintiff alleges that defendants have violated Title VII by: maintaining, terminating, or hiring employees on the basis of sex; providing males unfavorable working conditions compared to females; maintaining policies and practices which deny equal opportunity to employees; permitting harassment of plaintiff by defendants' employees; denying proper working conditions to plaintiff; and discriminating against him on the

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[1] Plaintiff names the following individual defendants; Lt. Kathryn R. Repperger, Irene Morrison, Mark Karraker, Shirl Conrad, and Raymundo Trevino.

basis of his race, age and sex. In Count III, plaintiff alleges that defendants have discriminated against him regarding the terms and conditions of his employment on the basis of his disability.

Defendants focus their Motion to Dismiss on the vagueness of plaintiff's Complaint, arguing that he fails to describe the specific acts that constitute discrimination against him. Defendants also argue that the Complaint fails to specify who is responsible for the discriminatory acts, the nature of plaintiff's specific disability, or the time period in which the alleged discrimination occurred. Plaintiff does not refute defendants' arguments in his Opposition. Instead, he appears to refer to a compliant different from the one at issue in this litigation.[2]

We find that the defendants have correctly argued that the allegations in plaintiff's Complaint are insufficient to state a claim upon w which relief may be granted. Conclusory allegations of discrimination and harassment are not sufficient to state a claim upon which relief may be ranted. *Simpson v. Melch*, 900 F.2ed 33, 35 (4th

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[2] On pages 5-9 of His Opposition, Plaintiff quotes from a five-count complaint that is not before this Court. On pages 25-27 of the Opposition, plaintiff again references this other complaint, count by count. This other complaint contains causes of action not plead in the Complaint before the Court, including a claim of defamation.

Cir. 1990). In Simpson, the Fourth Circuit affirmed the dismissal of a Complaint in which plaintiff generally alleged that she was required to work under conditions in which bias and prejudice existed, without alleging an specific oppressive condition s or specific expressions of prejudice or bias. Like the Complaint In Simpson, the instant Complaint contains no factual allegations to support any of the causes of action plead. Moreover, plaintiff does not elaborate on the factual circumstances surrounding his claims in his Opposition to defendants' Motion.[3] Given the inadequacy of plaintiff's complaint, it must be dismissed. Even if plaintiff's Complaint has been adequately plead, it might have been subject to dismissal for failure to exhaust administrative remedies. Although the Complaint states that plaintiff has filed a complaint with the EEOC, and a copy of an EEOC right to sue letter is attached to the Complaint, that letter identifies plaintiff's EEOC complaint as one for disparate treatment during 2000 and 2001

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[3] Plaintiff instead focuses much of his Opposition on the procedural propriety of defendants' Motion to Dismiss. In addressing defendants' argument that he has failed to state a claim upon which relief can be based, plaintiff relies on the language of Rule 8 (A), which requires a short, plain statement of the claim, while ignoring cases such a s Simpson that address pleading requirements in the context of a Title VII action.

in the terms and conditions of his employment with regards to being denied personnel actions, pay, promotions and training n the basis of his prior EEO activity. These allegations do not appear to be the same as the claims of race, gender, age and disability discrimination raised in the instant complaint. Because we cannot determine whether the instant claim are reasonable related to the EEOC complaint or were developed by reasonable investigation of the EEOC complaint, we cannot determine with certainty whether the instant charge are within the scope of the EEOC complaint. See, *Evans v. Technological Applications & Services Co.*, 80 F3d 954, 963 (4th Cir. 1996). If the changes were not presented to the EEOC, this Court may not assume jurisdiction over them now. *Davis v. Grabo Department of Correction*, 48 F.3d 134, 137 (4th Cir. 1996).

Finally, we note that plaintiff has named several defendants, both individual and organizations, that are not proper defendants in this action. Assuming that his is a Title VI action, the only proper defendant is the Secretary of the Army, in his official capacity. 42 U.S.C. Sec 2000a-16a(c).

For the reasons stated above, defendants' Motion to Dismiss is GRANTED

ORDERED that the Complaint be and is DISMISSED WITH PREJUDICE as to all defendants except the Secretary of the Army, as to who the Compliant be and is DISMISSED WITHOUT PREJUDICE. [4]

Should plaintiff wish to appeal this Order, written notice of appeal must be filed with the Clerk of this Court within sixty (60) days of the date of the Order.

The Clerk is directed to forward copies of this Order to counsel of record and plaintiff, pro se, Lynn Howard, 21510th Postal Co., Box 493, Unit 23234, APO AP 09192.

Entered this 7th day of June, 2004.

/s/ Leonie M. Brinkema
United Stated District Judge

Alexandria, Virginia

[4] Whether plaintiff may refile any or all of these allegations in a new lawsuit depends on whether the nature of the claims were properly exhausted administratively. For this reason the dismissal is without prejudice.